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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1984

JAMES B. JENSEN, JR.; RICARDO S. TOMACRUZ; LEARJET PHILIPPINES, INC., a corporation; JAMES B. JENSEN & CO., INC., a corporation; and HAMIX INTERNATIONAL, LTD., a corporation

Petitioners

vs.

GATES LEARJET CORPORATION and GATES LEARJET EXPORT CORPORATION

Respondents

On Appeal from the Ninth Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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66 pp

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QUESTIONS PRESENTED FOR REVIEW

1. Is the exercise of personal jurisdiction over the Petitioners consistent with the standards set forth in *International Shoe Company v. Washington*, 326 U.S. 310 (1945), and its progeny? More specifically, since the contacts of the Defendants (Petitioners) with the forum state are similar to those of the defendants in *Helicopteros Nacionales de Colombia, S.A. v. Hall*, ___ U.S. ___, 104 S. Ct. 1868 (1984), and the claims in the lawsuit no more directly related to those contacts, do the claims "arise out of" the contacts for purposes of specific jurisdiction over the persons of the Defendants?

2. Do the contacts by one (corporate) Defendant with the forum state give the District Court jurisdiction over the persons of other Defendants?

3. If the Court of Appeals merely says it is applying an "abuse of

discretion" standard when reviewing the decision of the District Court conditionally dismissing Plaintiffs' Complaint on *forum non conveniens* grounds, may the Court of Appeals then conduct its own *de novo* review of the facts?

PARTIES

The parties to the proceeding in the Ninth Circuit Court of Appeals whose judgment Petitioners seek to have reviewed are as follows: Learjet Philippines, Inc.; James B. Jensen and Company, Inc.; James Jensen, Jr.;* Ricardo Tomacruz, and Hamix International, Ltd. (Petitioners), and Gates Learjet Corporation and Gates Learjet Export Corporation (Respondents, sometimes referred to as Plaintiffs).

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* Respondents have misnamed Mr. Jensen, adding a "B." to his name, perhaps confusing him with the company that was started by (and bears) his late father's name.

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OPINION BELOW

The Decision of the Ninth Circuit Court of Appeals is reported at 743 F.2d 1325 (9th Cir. 1984).

DATES OF DECISIONS BELOW

The judgment of the Ninth Circuit Court of Appeals of which review is sought was entered on September 27, 1984 (Appendix 4).

The Ninth Circuit Court of Appeals denied Petitioners' Motion for Rehearing and Suggestion for Rehearing en Banc on November 27, 1984 (Appendix 5).

JURISDICTION OF THIS COURT

This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals on this Petition for Writ of Certiorari under 28 U.S.C. §2101.

CONSTITUTIONAL PROVISION

The decision of the Ninth Circuit Court of Appeals violates Petitioners' right to due process of law guaranteed by

the Fifth Amendment of the United States Constitution, the pertinent part of which states, "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

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STATEMENT OF THE CASE AND FACTS

In the Summer of 1981, after asking for and receiving from Learjet Philippines, Inc. ("LPI"), LPI's marketing plan (identifying the potential customers for the future sale of Learjets in the Republic of the Philippines), Respondents notified LPI that LPI would no longer be acting as distributor for Respondents' products (Learjets) in the Republic of the Philippines. During the period 1978 until April 1981, LPI worked under written contract with Gates Learjet Export Corporation ("GLEC") (a wholly-owned subsidiary of Gates Learjet Corporation ("GLC")), to act as distributor for Learjet in the Philippines. After April 1981, LPI continued to work under an oral agreement with GLEC until the Notice of Termination on October 15, 1981. In November 1981, Respondents sent a salesman with a demonstrator airplane to the Philippines to

attempt to complete some of the sales LPI had been working on before it received the Notice of Termination. Respondents neglected to obtain the proper licenses from the Philippine authorities to do business there. When their employee and plane arrived, both were seized (under a complaint sworn by Ricardo Tomacruz). Bond was posted and the salesman and airplane were released pending trial. The criminal action is still pending.

LPI filed an action against Respondents in the Court of First Instance of Rizal Branch, Republic of the Philippines, on December 1, 1981. That complaint alleged, in substance, that Respondents had attempted "to take advantage of the beneficial results of Plaintiff's sacrifices, efforts and expenses" without paying and that Respondents had damaged LPI's business reputation in the Philippines. Respondents

answered and counterclaimed for malicious prosecution.

On December 10, 1981, Petitioners Ricardo S. Tomacruz and James Jensen, Jr., filed suit in the Court of First Instance, Cabanatuan City, Republic of the Philippines against Respondents and three individuals: Bermar S. Stillwell, John Benson and Michael F. Fahey.

This action was originally filed by Gates Learjet Corporation and Gates Learjet Export Corporation in the Superior Court of Pima County, Arizona, on February 3, 1982. Since there was complete diversity of citizenship of the parties, the Defendants removed the action to the United States District Court for the District of Arizona by filing a Petition for Removal and Bond on March 15, 1982. The District Court had jurisdiction to hear the cause under 28 U.S.C. §§1331 and 1442.

On motion of Defendants, the Honorable Alfredo C. Marquez, United States District Judge for the District of Arizona, dismissed Counts II and III of Plaintiffs' Complaint for lack of jurisdiction over the person of James B. Jensen and Company, Inc., on September 23, 1982[1] (Appendix 1). The subject matter of the four counts of Plaintiffs' Complaint is of some importance and will be discussed below.

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[1] At the time the motions were filed which gave rise to the September 23, 1982, Order, only Defendant James B. Jensen and Company, Inc., was before the court. The other Defendants had not yet been served. Thereafter, on April 20, 1983, defendants James Jensen, Jr., Ricardo Tomacruz and Hamix International, Inc., filed their Motion to Dismiss. On May 31, 1983, by Minute Entry Order, Judge Marquez clarified his Order of September 23, 1982, as follows:

> "Court's order of September 23, 1982, is clarified to reflect that Counts II and III are dismissed as to all parties named in those counts." Appendix 2.

Since the Complaint was not entirely dismissed,[2] Defendants filed their Answer to Counts I and IV, together with counterclaims against the Plaintiffs (and others). Although the counterclaims will not be described in detail, they were compulsory[3] to the Plaintiffs' Complaint, inasmuch as they arose out of the same transactions which gave rise to Plaintiffs' Complaint. They will not be described in detail, as they are not material to this Petition.

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2 The September 23, 1982, Order ended by saying, "It is ordered that defendant Jensen, Inc.'s motion to dismiss for lack of personal jurisdiction is denied as to counts I and IV and granted as to counts II and III."

3 As the District Court found. The Court of Appeals found that, although some of the counterclaims arguably were permissive, since Petitioners continued to challenge the court's jurisdiction over them, the counterclaims did not amount to a waiver of the jurisdictional defenses. 743 F.2d 1325.

After substantial discovery was done as to Counts I and IV,[4] and as to Defendants' counterclaims, Defendants moved on October 5, 1983, for an order virtually identical to the order in *Cheng v. Boeing Company*, 708 F.2d 1406 (9th Cir. 1983), conditionally dismissing Counts I and IV of the Complaint (and all but one of the counterclaims), so those claims could be tried

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[4] It is significant that the District Judge first dismissed Counts II and III (the malicious prosecution and interference with contractual relations counts). It was with the knowledge that those claims would have to be tried in the Philippines *anyway*, that the District Judge viewed the Motion to Dismiss Counts I and IV on grounds of *forum non conveniens*. The Ninth Circuit's *de novo* review of the facts supporting the dismissal for *forum non conveniens* of Counts I and IV does not take into account that the discovery on Counts II and III has not been done and that virtually *all* of the witnesses as to Counts II and III are located in the Philippines. This failure to apply what might be called the "distributive property" of review makes the Court of Appeals' conclusions regarding the private and public interest factors regarding the *forum non conveniens* dismissal appear to have a better basis in fact than they actually do.

in the more convenient forum: the Republic of the Philippines.

On November 1, 1983, after carefully reviewing the private and public interest factors at stake, in light of this Court's decisions in *Gulf Oil Corporation v. Gilbert*, 330 U.S. 501 (1947); *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518 (1947), and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), the District

Court conditionally dismissed[5] the remaining counts of the Complaint (Appendix 3).

On November 16, 1983, on Order of the District Judge, the clerk entered final (partial) judgment as to Counts I and IV of Plaintiffs' Complaint and all but one of the counterclaims. On November 29, 1983,

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[5] The conditions were virtually identical to those in *Cheng v. Boeing Company, supra:*

> "(a) That the courts of the Philippines accept jurisdiction to adjudicate the plaintiffs' claims; (b) that the defendants submit to the jurisdiction of the appropriate court of the Philippines; (c) that the defendants make their employees available as witnesses in the Philippines; (d) that defendants waive any statute of limitations defenses which might have arisen during the pendency of the actions in this court; (e) that defendants recognize any judgment rendered by a court in the Philippines; (f) all discovery and the products may be used in any action in the Philippines - subject to objections which could be made in this court." Appendix 3.

the District Judge ordered that final (partial) judgment be entered as to Counts II and III of Plaintiffs' Complaint, which the clerk did that same day. On November 30, 1983, Respondents appealed to the Court of Appeals the dismissal of both "halves" of their Complaint.

On September 27, 1984, a panel of three Judges of the United States Court of Appeals for the Ninth Circuit entered an Order reversing the dismissal of Plaintiffs' Complaint. 743 F.2d 1325. Petitioners filed a Petition for Rehearing and Rehearing en Banc. On November 27, 1984, that Petition was denied. It is the September 27, 1984, Order which we would ask this Court to review and reverse.

DESCRIPTION OF PLAINTIFFS' COMPLAINT

The Plaintiffs' Complaint was in four counts. The gravamen of Count I is that LPI, Jensen and Tomacruz, after termination

of LPI's distributorship by Gates Learjet Corporation:[6]

> "[I]n violation of *their* contractual covenants . . .(7) wrongfully continue to represent themselves as distributors or agents for the plaintiffs and to use the plaintiffs [sic] exclusive trade names and trademarks for their own benefit and for the purpose of confusing potential Gates Learjet customers to the detriment of the plaintiffs." Complaint, ¶13 (emphasis added).

Count I goes on to allege that Hamix International, Ltd., and James B. Jensen and Company, Inc., are "mere conduits through which the other defendants conduct their

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6 In its Counterclaim and in the Philippine action, Learjet Philippines, Inc., contends that the termination was wrongful and done in bad faith.

7 Even though the contract, which was attached to the Complaint, plainly shows that LPI and GLEC were the only contracting parties, Respondents allege that Jensen and Tomacruz also had "contractual covenants". Officer/shareholders of a corporation are not liable for contractual or other liabilities of the corporation. *Employer's Liability Assur. Corp. v. Lunt*, 82 Ariz. 320, 313 P.2d 393 (1957).

business and hide their assets . . ." *Id.*, ¶14.[8]

The essential allegations of Count II of Plaintiffs' Complaint are that:

> "[T]he defendants 'Learphil', 'Jensen', and 'Tomacruz' have filed two civil actions and one criminal complaint in various courts in the Republic of the Philippines against the plaintiffs and have repeatedly caused property of the plaintiffs to be seized while in the Philippines, and have caused the arrest of an employee of the plaintiff." *Id.*, ¶15.

Count II goes on to allege that those actions "constitute an abuse of process".

Count III alleges that "[t]he defendants Jensen and Tomacruz have threatened and intimidated potential customers of the plaintiffs by threatening to join those customers in the vexatious litigation men-

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[8] That is what will be referred to hereafter as the *alter ego* claim. Respondents have never come forward with any evidence to support that claim. See Plaintiffs' Opposition to Motion to Dismiss filed May 20, 1983.

tioned above."[9] Those actions were allegedly done "for the purpose of damaging or destroying the capability of the plaintiffs to conduct lawful business *within the Philippines*." Complaint, ¶16 (emphasis added).

Count IV is merely a restatement of Count I, only alleging a conspiracy among

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[9] The Court of Appeals incorrectly concluded that:

> "Count three alleges that the defendants interfered with Gates' contractual relations with its customers in the Philippines. This count also arises out of the distributorship agreement because its factual basis concerns whether Jensen improperly used Gates' tradenames [sic] contrary to the terms of the distributorship agreement." 743 F.2d 1325, 1332.

That conclusion seriously misapprehends the relationship between the actual allegations of Count III and the distributorship agreement.

all the Defendants to make unlawful use of the trade name and mark.[10]

ARGUMENT

Introduction -- Significance of This Case --

Petitioners seek review of the decision of the Court of Appeals, first and most obviously, because it is wrong. The decision is also contrary to the decisions of this Court and of other Circuit Courts of Appeal and State Supreme Courts which have dealt with these issues. The jurisdictional issues are important, not only to the parties in this case, but to other litigants as well, because this case squarely presents the issues left unre-

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10 There is no such thing as a civil conspiracy under Arizona law. *Perry v. Apache Junction Elementary School District*, 20 Ariz. App. 561, 563-64, 514 P.2d 514, 516-17 (1973) (which is applicable to this case under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)).

solved by *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra.*

JURISDICTION OVER THE PERSON

The opinion of the Court of Appeals does not, in any meaningful way, deal with the claims of any of the Petitioners other than LPI that they are not subject to the jurisdiction of the Arizona court. The court focused only on the fact that Learjet Philippines, Inc. (by and through Petitioners Jensen and Tomacruz), had entered into certain contracts with GLC and GLEC. Yet, it reversed the dismissal of Counts II and III as to all Defendants.

Petitioners' Contacts with Arizona --

The Court of Appeals correctly held that none of the Defendants is doing business in the State of Arizona and, therefore, they are not "present" here for the purpose of general jurisdiction over their persons. The evidence concerning Petitioners' contacts with Arizona is as follows:

(a) Hamix International, Ltd.: None. Hamix was the beneficiary of a contract between LPI, as trustee, and GLC/GLEC for the purchase of one airplane. When Hamix' Motion to Dismiss was denied, LPI counterclaimed for breach of that contract.

(b) James B. Jensen and Co., Inc. ("Jensen, Inc."): None. There was evidence that Jensen, Inc., had purchased, through the channels of interstate commerce, parts from GLC *in Wichita, Kansas* (Affidavit of James Jensen, Jr., attached to Motion to Dismiss of James B. Jensen & Co., Inc.) Other than that, the only evidence adduced by Respondents concerned Jensen, Inc., relaying LPI's mail through Jensen, Inc.'s San Francisco offices.

(c) James Jensen, Jr. and Ricardo Tomacruz traveled to Tucson, Arizona, from time to time, first to obtain for LPI (which was to be formed for that purpose) the Learjet distributorship for the

Philippines, then to enable LPI to carry out those duties. They attended distributors' conferences as officers of LPI and travelled to Tucson to pick up airplanes being purchased by LPI. Neither they nor LPI ever established a place of business in Arizona.

(d) Learjet Philippines, Inc., executed three annual distributorship agreements[11] (each of which contained an Arizona "Choice of Law" clause[12] and an

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11 Since all the agreements in this case were "form agreements", recent Arizona case law has cast doubt on the enforceability of terms such as those discussed here. *Darner Motor Sales, Inc. v. Universal Underwriters Insurance Co.*, 140 Ariz. 383, 682 P.2d 388 (1984).

12 "[T]his is an Arizona agreement and . . . it shall be governed by the laws of the State of Arizona of the United States of America in all matters, including, but not limited to, validity, obligation, interpretation, construction, performance and termination."

Arizona arbitration clause).[13] LPI also entered into several contracts for the purchase of aircraft, but no one contends

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[13] Not, as suggested by the Court of Appeals, an Arizona forum clause. It is most significant that not even LPI (much less Jensen and Tomacruz) ever agreed to be "hauled into court in Arizona" (where Gates, as it has so proudly hailed over and over again in this case, is one of the largest employers.) It is also very significant that Respondents did not take advantage of their Arizona arbitration clause. Had Respondents thought these claims arose out of their agreements with LPI, they presumably would have filed for arbitration under the provision of the contract that reads:

> "Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, which has been timely and properly made, shall be settled by arbitration in Tucson, Arizona, in accordance with the Rules of the American Arbitration Association. Judgment upon the award rendered may be entered in *any court of any country having jurisdiction*." (Emphasis added.)

That provision certainly does not imply that LPI was agreeing that Arizona courts had jurisdiction over LPI.

that Respondents' Complaint in any way "arises out of" those contracts.

The essence of the holding of the Court of Appeals is as follows:

(1) Gates Learjet, sitting in Tucson, terminated[14] LPI's right to sell Learjets in the Philippines.

(2) The victim of the tort and breach of contract (LPI) filed suit in the Philippines, alleging: (a) its right to, and expectation of, making profits in the Philippines (based upon its efforts to sell aircraft in the Philippines) were wrongfully interfered with by Respondents, and (b) Gates Learjet sent its employee *to the Philippines* in an attempt to sell airplanes *in the Philippines* to customers LPI had "cultivated".

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[14] The termination was both a breach of contract and tort. *See Sparks v. Republic National Life Insurance Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982).

(3) The filing of the lawsuit in the Philippines by LPI subjects all the Petitioners to jurisdiction in Arizona, not to determine the validity of the contract or the termination thereof but, rather, to determine the legality of the lawsuit filed in the Philippines.

The Court of Appeals said:

> "Thus, count two of Gates' complaint arose out of the distributorship agreement *because its termination induced* defendants' alleged harassment and intimidation of Gates.' 743 F.2d 1325, 1332 (emphasis added).

Hanson v. Denckla, 357 U.S. 235 (1958), prohibits this "reactive" basis for jurisdiction.[15] *See also Rush v. Savchuk*, 444 U.S. 320 (1980).

It violates the very essence of *Hanson v. Denckla* to say that, because Gates'

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[15] "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." 357 U.S. 235, 253.

principal residence and place of business is Tucson, Arizona, and its actions in Tucson angered and injured LPI *in the Philippines* and prompted LPI to bring suit *in the Philippines*, an Arizona court has jurisdiction to decide whether the lawsuit filed in the Philippines was an abuse of process (Count II) or a wrongful interference with "the capability of the plaintiffs to conduct lawful business within the Philippines" (Count III).

We can analogize to a slightly modified version of the classic example of long-arm jurisdiction:

A and B were married in state AA. B moved away to state BB and divorced A. Then A, standing on the border of State AA, shoots a gun across that border into State BB, striking B. B then brings an action in battery in the courts of State BB against A. A then sues B in the courts of State AA for "malicious prosecution".

In the example, it is true that, "but for" A's firing his gun (while in State AA), B would have never filed suit for battery.[16] Also, "but for" the marriage of A to B, A would not have committed the battery.[17] But the action involved is malicious prosecution (not battery and not divorce). While it is true that there is a relationship between the defendant, B, and the forum, AA, and it is also true that there is a relationship between the defendant and the litigation, there is not a sufficient "relationship among the defendant, the forum, and the litigation", *Shaffer v. Heitner*, 433 U.S. 186, 204 (1977), to make the exercise of jurisdiction by the courts of AA over the person of

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16 That is activity within the forum analogous to Respondents' termination of LPI's distributorship.

17 That is contact with the forum analogous to LPI's "Arizona agreements" with Respondents.

B fair in the malicious prosecution action.[18]

Getting back to our case, it may be that, in the "For want of a nail the shoe was lost" sense, Counts II and III "arise out of" the distributorship agreement, but the question this Court should address is whether the relationship between Respondents' Complaint and Petitioners' forum-related activity is strong enough to satisfy the fairness requirements of *International Shoe, supra.*

The Case Law --

The recent history of this Court's involvement in the area of personal jurisdiction is rather interesting. Since *International Shoe Co. v. Washington,* 326 U.S. 310 (1945), first opened the door to

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[18] Even though it might be fair (and constitutional) for the courts of State AA to grant a divorce to A. *Williams v. North Carolina,* 325 U.S. 226 (1945).

"long-arm" jurisdiction back in 1945, the lower Federal courts and the state courts have engaged in a campaign of "creeping jurisdiction". In recent years, the Supreme Court has had to act to slow or reverse the trend of the lower courts to expand their power (jurisdiction) beyond the limits set forth in *International Shoe*.

Yet, even when this Court spoke on this subject, the lower courts did not always hear or understand what was being said. One of the strangest things was the

lack of attention the lower courts paid to *Hanson v. Denckla, supra.*[19]

After the decision in *Hanson v. Denckla,* this Court was silent on the

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19 One commentator described the history of *Hanson* and its progeny as follows:

> "In *Hanson v. Denckla,* the United States Supreme Court held that in every case in which personal jurisdiction was asserted over a nonresident defendant the plaintiff was required to show that the defendant had 'purposefully availed' itself of the protections and benefits accorded by the laws of the forum state. If one took that standard literally it was clear that there would be a great many cases in which jurisdiction could not be asserted over a nonresident defendant notwithstanding the fact that the assertion of jurisdiction was eminently fair. As a result, many commentators and many courts concluded that *Hanson* was simply a spoof on the part of the Supreme Court. The Arizona Supreme Court in *Phillips v. Anchor Hocking Glass Corp.* specifically held that the *Hanson* requirement did not apply to products liability litigation since in such cases the actor by definition does not act intentionally. As a result the *Hanson* standard fell into disuse until it was dramatically

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subject of personal jurisdiction for almost twenty years. Then, with *Shaffer v.*

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> resurrected in a series of four cases beginning in the 1976 term of the Supreme Court. The first of those cases, *Shaffer v. Heitner*, rejected Delaware's attempt to assert *quasi in rem* jurisdiction based upon the 'presence' of stock in a Delaware Corporation. The court there held that *all* assertions of state court jurisdiction had to be based upon a finding that the assertion of jurisdiction was consistent with the 'traditional notions of fair play and substantial justice' standard first articulated in *International Shoe*. At the same time, the court signalled a resurrection of a relaxed *Hanson* requirement by noting that the defendant in the case before them could not have 'reasonably anticipated' being hailed before a Delaware court. In the next term, the Court once again emphasized the redefined *Hanson* standard in *Kulko v. Superior Court*, where it rejected jurisdiction in a case where it found that the defendant could not have 'reasonably anticipated' litigation in the forum state. Finally, last term in *World-Wide Volkswagen Corporation v. Woodsen* [sic], the court made clear that

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Heitner, 433 U.S. 186 (1977), this Court finally began to reestablish the limits of *International Shoe*, *supra*, and *Hanson v. Denckla*, *supra*. The next year, the Court spoke on the subject again in *Kulko v. Superior Court*, 436 U.S. 84 (1978). Two years later, in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), and *Rush v. Savchuk*, 444 U.S. 320 (1980), then again

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> the *Hanson* test, as redefined in *Shaffer* and *Kulko*, is an essential element in every case in which jurisdiction is asserted over a nonresident defendant. In doing so, the court once again invoked the 'reasonable anticipation of litigation' language thus making crystal clear that the shift in focus begun in *Shaffer* had emerged as the new standard by which *Hanson*-type problems are to be judged." "Aftermath of *World-Wide Volkswagen*", Summary of Remarks of Professor Winton Woods, at the Arizona Judicial Conference, December 4, 1980, published as *Debugging Volkswagen: The New "Anticipation of Litigation" Test*, University of Arizona Law Record (Winter, 1980), p. 3.

last year in *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra,* the Supreme Court stepped in to reverse the tide of widening jurisdiction in the lower courts.

The Unanswered Question --

This case squarely presents the issue scrupulously reserved by the Supreme Court in *Helicopteros Nacionales, supra.*[20] *Helicopteros Nacionales* involved the question of whether the defendant's contacts with the State of Texas were significant and continuous enough to warrant the exercise of *general* jurisdiction over the per-

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[20] The court's opinion in *Helicopteros Nacionales* was announced just two weeks prior to argument in this case and after all the briefs had been filed in the Court of Appeals. It was raised by Petitioners during oral argument on May 13, 1984, and in the Petition for Rehearing and Rehearing en Banc (Appendix 14, at p. 6).

son of the defendant.[21] Both the majority and dissent went to great pains to point out that the issue being decided was only whether defendant's business contacts with Texas were "continuous and systematic general business contacts . . ." 104 S. Ct. at 1873; *see also* 104 S. Ct. 1876, n. 1 (Brennan, J., dissenting). The Court did not reach the issue of "specific jurisdiction":

> "Because the parties have not argued any relationship between

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[21] The defendant's contacts were remarkably similar to those of LPI.

> "It is undisputed that Helicol does not have a place of business in Texas and never has been licensed to do business in the State. Basically, Helicol's contacts with Texas consisted of sending its chief executive officer to Houston for a contract-negotiation session; . . . purchasing helicopters, equipment, and training services from Bell Helicopter for substantial sums; and sending personnel to Bell's facilities in Fort Worth for training." ___ U.S. ___, 104 S. Ct. at 1873.

> the cause of action and Helicol's contacts with the State of Texas, we . . . assert no 'view' with respect to that issue.
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> * * *
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> . . . Absent any briefing on the issue, we decline to reach the [question] . . . what sort of tie between a cause of action and a defendant's contacts with a forum is necessary to a determination that either connection exists." 104 S. Ct. at 1873, n. 10.

See also id., n. 12.

This Court should not willingly leave any uncertainty on this issue of personal jurisdiction. This case can answer the questions left unanswered by *Helicopteros Nacionales*.

Let us, then, examine the contacts of *each* Defendant and *each* cause of action with the State of Arizona to see if there is any basis for jurisdiction. First of all, the activities of Learjet Philippines, Inc., can in no way support the exercise of

jurisdiction over the other Defendants. *Rush v. Savchuk, supra.*[22] *Helicopteros Nacionales, supra* ("Such unilateral activity of *another party* or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State to justify an assertion of jurisdiction." 104 S. Ct. at 1873 (emphasis added)).

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22 "The Minnesota court also attempted to attribute State Farm's contacts to Rush by considering the 'defending parties' together and aggregating their forum contacts in determining whether it had jurisdiction. The result was the assertion of jurisdiction over Rush based solely on activities of State Farm. Such a result is plainly unconstitutional. Naturally, the parties' relationships with each other may be significant in evaluating their ties to the forum. The requirements of *International Shoe*, however, *must be met as to each defendant* over whom a state court exercises jurisdiction." 444 U.S. 320, 331-32 (emphasis added).

The touchstone of personal jurisdiction is fairness. *International Shoe Co. v. Washington, supra.* That is determined, as was pointed out above, by the "relationship among the *defendant*, the *forum*, and the *litigation* . . ." *Shaffer v. Heitner, supra,* 433 U.S. at 204 (emphasis added). Even if the exercise of jurisdiction over Learjet Philippines, Inc., be fair (because it entered into contracts with GLC and GLEC which are tangentially related to this litigation), that does not in any way make it fair to "drag" the individual officer/employees of that corporation, who were acting on its behalf, to Arizona for a trial. *Powder Horn Nursery,*

Inc. v. Soil and Plant Laboratory. Inc., 20 Ariz. App. 517, 514 P.2d 270 (1973).[23] *See*

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23 "Under these circumstances, it is difficult to say that these individual defendants, as opposed to their corporate employer, have caused an event to occur in Arizona with sufficient minimum contacts by these defendants with Arizona to justify the state's 'long arm' jurisdiction over them. The contractual objectives, which we deemed to be of considerable importance in establishing jurisdiction over the defendant corporate employer, are diluted significantly when considered in relation to the individual defendants. . . . While acts done by non-resident individuals in the scope of their employment or duties for a foreign corporation may be sufficient to establish *in personam* jurisdiction over their corporate employer, it does not necessarily follow that these same acts will be sufficient to support *in personam* jurisdiction over the non-resident individuals. *Wilshire Oil Company v. Riffe*, 409 F.2d 1277 (10th Cir. 1969); *Willner v. Thompson*, 285 F. Supp. 394 (E.D.N.Y. 1968); *Unicon Management Corp. v. Koppers Co., Inc.*, 250 F. Supp. 850 (S.D.N.Y. 1966); *cf. Magidow v. Coronado Cattle Co.*, 19 Ariz. App. 38, 504 P.2d 961 (1972)." 20 Ariz. App. 517, 524, 514 P.2d 270, 277.

also Basham v. Hendee, 614 P.2d 87 (Okla. App. 1980).

The other serious problem with Counts II and III which the Court of Appeals did not adequately address concerns the interference with Philippine sovereignty. This is not just a problem with the difficulty of applying foreign law or the interest the Republic of the Philippines has "in resolving disputes that involve its citizens". 743 F.2d 1325, 1333.

Paragraph 15 of Respondents' Complaint seeks damages for "the filing of the civil actions, the criminal complaint, the seizure of plaintiffs' property and the arrest of plaintiffs' employee . . ." Count II will truly involve a United States court sitting in judgment as to the legality of actions taken by the courts of a foreign land. This Court has previously held that our courts will not sit in judgment of the acts of foreign sovereigns. *Banco Nacional*

de Cuba v. Sabbatino, 376 U.S. 398, 438-39 (1964); *see also Kunstsammlungen Zu Weimar v. Elicofon*, 678 F.2d 1150 (2d Cir. 1982); *Zenith Radio Corporation v. Matsushita Electric Industrial Co., Ltd.*, 513 F. Supp. 1100 (E.D. Pa. 1981); *Maltina Corporation v. Cawy Bottling Company*, 462 F.2d 1021 (5th Cir. 1972); *Signal Properties, Inc. v. Farha*, 482 F.2d 1136 (5th Cir. 1973).

Although Count III does not come as close to implicating the act of state doctrine (on its face, Count III is limited to interference with GLC's attempts to do business in the Philippines), it does involve the legality of alleged threats of litigation in the Philippines. Imagine if the situation were reversed, and a Philippine court were sitting in judgment of this Court's Noerr-Pennington Doctrine in the context of actions taken in <u>this</u> country or of some other restraint affecting trade in this country! *See Laker*

Airways Limited v. Sabena, Belgian World Airlines, 731 F.2d 909 (D.C. Cir. 1984).

So, the interference with Philippine sovereignty is much more substantial than the Court of Appeals realized. These are not just private interests being litigated in Counts II and III.

Summary --

The decision of the Court of Appeals cannot be allowed to stand. *Helicopteros Nacionales* all but invited this case to come before this Court. This case gives the Court the opportunity to address the "arising out of" issue, while dealing with an important question of international comity and respect for the courts of an ally of this country. Petitioners pray that the Court grant their Petition as to Counts II and III at least, so this dangerous precedent (and this injustice to them) can be erased.

FORUM NON CONVENIENS

The portion of the decision of the Court of Appeals reversing the conditional dismissal by Judge Marquez of Counts I and IV was, in some ways, as prejudicial to our court system and the orderly administration of justice here as the reversal as to Counts II and III was to the courts of the Republic of the Philippines.

There is no question that, if the District Judge had viewed the factors governing conditional dismissals for *forum non conveniens* the way the Court of Appeals did, his decision might have been affirmed. The Court of Appeals' conclusions were not devoid of support in the record.

The problem with the decision is that the Court of Appeals was not hearing the Motion to Dismiss; it was hearing the *appeal* of the District Court's dismissal.

This problem is very similar to the problem some of the Courts of Appeal have

with the "clearly erroneous" standard of review of discrimination decisions. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). In this case, though, the difficulty is not in voicing the standard for review; it comes in applying what amounts to a "hands-off" policy.

The Court of Appeals here did just what the Court of Appeals in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), had done:

> "The *forum non conveniens* determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private interest factors, and where its balancing of these factors is reasonable, its decision deserves substantial deference. [Citation omitted.] Here, the Court of Appeals expressly acknowledged that the standard of review was one of abuse of discretion. In examining the District Court's analysis of the public and private interests, however, the Court of Appeals seems to have lost sight of this rule, and substituted its own

> judgment for that of the District Court." 454 U.S. 235, 257 (1981).
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> "An abuse of discretion is established only where no reasonable man could agree with the district court; if reasonable men could differ as to the propriety of the court's action, no abuse of discretion has been shown." *Smith v. Widman Trucking & Excavating*, 627 F.2d 792, 795-96 (7th Cir. 1980).

An examination of the Court of Appeals' analysis of the private and public interest factors present here shows that they were not looking for a *clear* miscalculation by the District Judge but, rather, they were making their own *de novo* determination.

The Private Interest Factors --

Respondents Are in Court Because They Tried To Do Business Abroad.

One of the problems with the Court of Appeal's analysis is that they essentially ignore the fact that LPI filed suit in the Philippines against Respondents *before*

Respondents filed their action in the Arizona court. It is all well and good to say, "The plaintiff's choice of forum should rarely be disturbed . . .", 743 F.2d 1325, 1334-35, but is it fair to apply that test in a case in which a party, who is already a defendant in an action in the foreign country, "runs back home" and files a suit against the foreigners to undo the trouble he got into abroad?

Respondents were not really "at home" Plaintiffs. They attempted to do business in a foreign country without obtaining the proper licenses. They got caught. They then returned home and asked the "home forum" to say that what they did in the Philippines was all right and that, in fact, what the Philippinos did in the Philippines to seek redress was wrongful.

In the words of the Eighth Circuit Court of Appeals, in *J. F. Pritchard and Company v. Dow Chemical of Canada, Ltd.*,

462 F.2d 998 (8th Cir. 1972), Respondents "made [their] bed in [the Republic of the Philippines]; now [they] must lie in it if [they] wish to proceed." 462 F.2d 998, 1002.

> "The doctrine that a United States citizen does not have an absolute right to use United States courts usually is expressed in the context of the citizen doing business abroad, expecting still to use United States courts." *Thomson v. Palmieri*, 355 F.2d 64, 65 (2d Cir. 1966).

That describes Respondents' predicament precisely.

The Chosen Forum.

There is a definite parochial bias to the decision of the Court of Appeals. Although the doctrine of abatement does not apply, since the actions are pending in different jurisdictions, *Laker Airways Limited v. Sabena, Belgian World Airlines, supra*, there is something essentially unfair about giving "great weight" to the

"plaintiff's choice of forum" when that is the second forum choice made in a dispute. That factor played a great part in the District Court's decision and absolutely no part in the analysis done by the Court of Appeals.

Location and Convenience of the Witnesses.

The Court of Appeals' conclusions concerning the location of witnesses demonstrates the primary reason why it is the District Court, and not the Court of Appeals, which should evaluate the evidence and weigh the relative inconvenience when deciding whether to conditionally dismiss a case so that it can be tried in a more convenient forum. The Court of Appeals' analysis of the private factors was limited to mechanistic view of the evidence. For example, the Court of Appeals quarrels with the District Judge's conclusion that the "vast majority" of the witnesses reside in

the Philippines, pointing to the fact that only twenty-three of forty-four total witnesses (a bare majority) live there.

The District Judge was not limited to a "head count" when making his decision. From the various motions which he had heard, the District Judge had become very familiar with the evidence and issues in this case. He was able to go beyond the bare numbers of witnesses and determine whether more of the *important* witnesses were located in the United States or in the Philippines. Respondents' Answers to Interrogatories disclosed *no witnesses* who would testify as to trade name infringement. The only witnesses they listed who would testify on the trademark claim were

Petitioners Tomacruz and James Jensen, Jr.[24]

It is also apparent from the very nature of Counts I and IV (as well as Counts II and III) that the vast majority of witnesses,[25] if there be any, would have

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[24] "[W]itnesses Nos. 8, 9 and 11 will testify as to their role in the Philippines attachment and judicial proceeding, as well as the trademark infringement, breach of contract and abuse of contracts counts of this Complaint . . ." Witness number 8 was identified as Ricardo Tomacruz. Witness number 9 was identified as James B. Jensen, Jr. There was no one identified as witness number 11. It is also interesting to note that Plaintiffs' answers to various interrogatories asking the identity of all persons who have knowledge of the alleged interference by the Defendants with Plaintiffs' contractual relations disclosed only Rolando Moscardon, Respondents' new distributor in the Philippines. Answers to Interrogatories 8 through 13, filed May 23, 1983. See also Supplemental Answers to Interrogatories filed May 24, 1983.

[25] The only witness listed by Respondents, other than the so-called "corporate damage witnesses", who is not located in the Philippines is Michael Fahey, the person who was arrested for trying to do business in the Philippines without a license.

to be located in the Philippines. Those claims only involved actions which took place in the Philippines.

There is one final witness problem that will attend trying this case in Arizona: Most of Respondents' Arizona witnesses are employees of Respondents. Respondents can, therefore, ensure their attendance at trial either in Arizona or in the Republic of the Philippines. The Philippine witnesses are, for the most part, independent of either party. It is problematical as to whether those witnesses can be encouraged[26] to attend a trial in the United States. Ambassadors and Generals,[27] for example, are not likely to

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26 They cannot be compelled.

27 In their Supplemental Answers to Interrogatories filed April 25, 1983, Respondents list as witnesses, General Hanz Menzi and Ambassador Roberto S. Benedicto. Petitioners would also like to call General Menzi to testify and have listed him as a potential witness.

be willing to drop their weighty matters of state to attend a trial in Tucson, Arizona. So, when the "*quality*" (rather than just the quantity) of the witnesses located in either jurisdiction is considered, the convenience and fairness weigh heavily in favor of a trial in the Philippines.

Another incorrect conclusion concerning a private interest factor concerns the Court of Appeals' failure to consider the effect of bringing Counts II and III back into the case when it viewed Counts I and IV. Even assuming, *arguendo*, that the District Court has jurisdiction over the persons of all the Defendants and that the reversal as to the dismissal of Counts II and III was proper, the aggregation of all four counts of Plaintiffs' Complaint, together with the counterclaims, makes it clear that the Philippines is the more appropriate forum for the entire case. For example, once Counts II and III are

"brought back in", it is no longer true that "the parties were ready for trial when [the District Court] dismissed the complaint for *forum non conveniens.*" 743 F.2d 1325, 1335.

Resolution of Counts I and IV will, at best, only resolve a small portion of the controversy between the parties. The District Court was well aware when it dismissed Counts I and IV that, in any event, Counts II and III would have to be tried in the Philippines, and the case was not, therefore, "ready for trial".

The Public Interest Factors --

Just as the location of the witnesses changes complexion when Counts II and III are "added back", so does the balance of which nation's laws are most seriously implicated tip in favor of the Philippines. *See Schertenleib v. Traum,* 589 F.2d 1156 (2d Cir. 1978) (affirming *forum non conveniens* dismissal of an abuse of process

and defamation action filed by a Swiss attorney against a New York attorney, based upon the latter's filing of criminal charges in Geneva and testimony at a preliminary hearing in Geneva); *Bolanos v. Gulf Oil Corporation*, 502 F. Supp. 689 (W.D. Pa. 1980) (affirming *forum non conveniens* dismissal of abuse of process/malicious prosecution action by a Guatemalan plaintiff arising out of his arrest, conviction and incarceration in Guatemala for extortion committed in Guatemala).

The Court of Appeals erroneously stated that Petitioners concede that Arizona law would be applicable to the breach of contract claims. 743 F.2d 1325, 1336, n. 6. What Defendants said in their brief was that the contract theory "would be governed by different rules [than Respondents' tort theory]" for resolving questions of conflicts of laws (Appellants' Brief at 12, n. 4). That is not a

concession that Arizona law will apply. *See* Restatement (Second) of Conflict of Laws §145, Comment *f*. Furthermore, Petitioners (except LPI) did not even have a contract with Respondents. As was pointed out above, even under Arizona law, a corporate officer/shareholder is not a party to a contract executed in the corporate name. *Employer's Liability Assur. Corp. v. Lunt, supra.*

As far as the trademark and trade name claims are concerned (Counts I and IV), Arizona has no trademark or trade name law which purports to have extraterritorial

effect.[28] That is consistent with the general law on the subject. Restatement (Second) of Conflict of Laws §145, Comment *f*, provides:

> ". . . The principal location of the defendant's conduct is the contact that will usually be given the greatest weight in determining the state whose local law determines the rights and liabilities that arise from . . . misappropriation of trade values." *Id.* at 424.

The other public interest factors have already been discussed in the portion of this Petition dealing with jurisdiction.

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28 *E.g.*, A.R.S. §44-1443 provides:

> "A. Subject to the limitations set forth in this article, any person who adopts and uses a trademark *in this state* may file in the office of the secretary of state, on a form to be furnished by the secretary of state, an application for registration of that trademark . . ." (Emphasis added.)

There is no Arizona statute or case which purports to give extraterritorial effect to that registration.

The Court of Appeals looked only at the (arguably) equal interests of each jurisdiction in protecting its citizens from harm. The court failed to take into account the interest the Republic of the Philippines has in its legal process.

There was one other factor relied on by Respondents, but not given much apparent weight by either the District Court or the Court of Appeals: the current political situation in the Philippines. Petitioners will only say two things on that subject: (1) there has been no showing that the current political unrest is affecting the courts in the Philippines; indeed, one might compare the problems there with the assassination of our President twenty-one years ago -- our courts continued to function then, just as theirs are now; and (2) if it turns out that civil order breaks down in the Philippines, Respondents can, under the express provisions of the

District Judge's Order, ask him to reverse the dismissal.

CONCLUSION

This Court, in *Piper Aircraft Co. v. Reyno, supra,* has already announced the principles which the Court of Appeals should have followed when viewing the *forum non conveniens* issue. This Court should summarily reverse that portion of the opinion of the Court of Appeals and affirm the decision of the trial court dismissing Counts I and IV.

As to Counts II and III, the situation is a little different. *Helicopteros Nacionales de Colombia, S.A. v. Hall, supra,* expressly reserved the question of "specific jurisdiction" over the persons of defendants with contacts with the forum state like the contacts of Petitioners here. Granting this Petition and writing an opinion would do a great deal to clarify for the lower courts the rules to be

applied in situations where there is some tangential relationship between the defendants and the forum state, but none which is, in essence, an element of the cause of action being brought.

Petitioners pray that this Court grant their Petition for Writ of Certiorari and reverse the decision of the Court of Appeals.

Respectfully submitted this 24 day of April, 1985.

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STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

I, HERBERT MALLAMO, one of the attorneys for James B. Jensen, Jr., Ricardo S. Tomacruz, Learjet Philippines, Inc., James B. Jensen & Co., Inc., and Hamix International, Ltd., Petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 2nd day of April, 1985, I deposited in a United States Post Office located at 1441 East Buckeye Highway, Phoenix, Arizona, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, within the time allowed for filing, the foregoing Petition for Writ of Certiorari, and that I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, as follows:

Michael J. Rusing
William H. Tinney
Post Office Box 871
Tucson, Arizona 85702

HERBERT MALLAMO

SUBSCRIBED AND SWORN to before me this 1st day of April, 1985, by HERBERT MALLAMO.

Notary Public

My Commission Expires:

May 22, 1986